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Filed Feb. 20, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 144.

B. F. THOMPSON, APPELLANT,

vs.

D. M. FERRY ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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As matter supplemental to our original brief on the point that in an action to foreclose persons being impleaded and summoned to court on the allegation that they claim *some interest* in the subject-matter may not be concluded as to interest not actually encumbered or conveyed by the mortgage itself, we submit the following authorities:

Freeman on Cotenancy, section 225, says:

"It has never been considered that a conveyance by one joint tenant or tenant in common of all his interest in real estate, though the land is described in such a manner as to pass the whole under the deed if the grantor had owned the whole, is notice of itself to the other joint owners of such exclusive claim to the land as to oust him of his legal seisin in

the land. He has the right to suppose that by such a deed both the grantor and the grantee understand it to convey the real interest the grantor owns in the land. The above language seems to point to a distinction between a deed which on its face assumes to convey the land and one which without making such an assumption is nevertheless sufficient to convey title in severalty if such the grantor had because it purports to convey all his interests in the land. * * * One who assumes to convey his interest without specifying its extent instead of asserting his title to be perfect and in severalty, seems to put the purchaser on his guard, and to direct him to inquire concerning the nature and extent of his acquisition. Such a grantee in entering may be presumed to enter, not as sole owner, but as succeeding to the true interest of his grantor, for that is all with which the deed purports to deal."

SECTION 226. "But a conveyance alone without possession taken under it can never amount to an ouster. The same remark is applicable to a mortgage of the whole. If such mortgage can have any relevancy in determining whether the mortgagor had been guilty of an ouster, it must be in connection with other circumstances tending to show an intent to hold the property adversely."

See Purcell *vs.* Wilson, 4th Gratt., 21, which holds:

"That the possession of one coparcener or tenant in common being the possession of all, none in possession of the whole subject can avail themselves of such possession as a defense under the statute of limitation against the rest without an actual disseisin or ouster of their coparceners or cotenants."

In Davis *vs.* Settle *et als.*, 43 W. Va., 18, the court held:

"Common seisin in fact or law, without regard to source of title, creates cotenancy."

In Doknan *vs.* Glynn, 28 W. Va., 725, the court held:

"Facts in controversy on the trial of an issue, but not necessarily involved in the issue, though ever so important to its determination, are not settled by a judgment on the issue, but are open to controversy in any other suit between the same parties and their privies."

In Dial *vs.* Reynolds *et als.*, 6th Otto, U. S. R., 340, held:

"In a foreclosure proceeding the complainant cannot make a person who claims adversely to both mortgagor and mortgagee a party and litigate and settle his rights in that case."

In Lewis *vs.* Smith, 9th New York (5 Selden), 502, held:

"Decree against defendant made party to a foreclosure suit under general allegation that he claimed some interest in the premises as subsequent purchaser, or incumbrancer or otherwise, bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee."

In San Francisco *vs.* Lawton, 18th California, 465, held:

"All persons are proper parties to suit to foreclose mortgage who are beneficially interested either in the estate mortgaged or the demand secured. This rule generally will only embrace the mortgagor and the mortgagee and those who have acquired rights or interests under them.

"In suit to foreclose mortgage, adverse titles to the premises held by the parties claiming by conveyance from the mortgagor prior to the mortgage or from third parties prior or subsequent to the mortgage are not the proper subjects of determination, but such titles must be settled in a different action.

"Foreclosure operates only upon estate or interest which *mortgagor possessed at the date of the mortgage, and the*

sale under the decree passes only such interest or estate, except in the single instance where the mortgagor has subsequent to the execution of the mortgage acquired a title which enures by way of estoppel to the benefit of the mortgagee, in which case the foreclosure operates upon the subsequent acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases the estate mortgaged is the *only estate* brought under the consideration of the court, and the *only estate* affected by its decree."

In Jones on Mortgages, vol. 2, section 1589, the author says:

"Where a party has a right under the mortgage and also a right prior to it he is not precluded in respect to the prior right by a judgment or foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. * * * The decree is final only within the proper scope of the suit which is to bar interests in the equity of redemption."

See Rathbone *vs.* Hooney, 58th N. Y., 463.

See Boggs *vs.* Fowler & Hargrave, 16th California, 559.

By these authorities it seems plain that appellee's contention, that the half interest in the Poland and Hamilton claims not included in the mortgage at the date of execution, could be considered affected by the foreclosure proceedings and the decree is absolutely without authority. Hence no estoppel, and hence the joint tenancy contended for in our original brief, and hence no limitation.

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